

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RAINdance TECHNOLOGIES, : CA NO. 15-152-RGA
INC., et al., :
:
Plaintiff, :
:
v. : April 27, 2017
:
10X GENOMICS, INC., :
:
Defendant, : 3:04 o'clock p.m.
.....:

TRANSCRIPT OF DISCOVERY DISPUTE
BEFORE THE HONORABLE RICHARD G. ANDREWS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs: FARNAN LLP
BY: MICHAEL J. FARNAN, ESQ

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-and-

WEIL GOTSHAL & MANGES LLP

BY: DEREK C. WALTER, ESQ

For Defendant:

RICHARDS, LAYTON & FINGER

BY: FREDERICK L. COTTRELL, III, ESQ

-and-

IRELL & MANELLA LLP

BY: MICHAEL H. STRUB, JR., ESQ

Court Reporter:

LEONARD A. DIBBS

Official Court Reporter

P R O C E E D I N G S

(The proceedings occurred at 3:04 o'clock p.m. as follows:)

THE COURT: All right.

So this is a discovery conference in RainDance Technologies v. 10X Genomics, Civil Action No. 15-152.

Mr. Farnan?

MR. FARNAN: Good afternoon, your Honor.

Michael Farnan on behalf of plaintiff, RainDance.

With me today is Derek Walter from Weil Gotshal.

THE COURT: Good afternoon.

Mr. Cottrell?

MR. COTTRELL: Good afternoon, your Honor. Fred Cottrell from Richards Layton.

With me is Michael Strub from Irell & Manella.

THE COURT: Thank you, Mr. Cottrell.

I read the letters that went back and forth that defendant says was the comprise that you all agreed to, right?

The e-mail chain with, I think, not with you, but with somebody else from your side. And I looked at the e-mail chain and I think that's a reasonable interpretation of what it was.

MR. WALTER: Yes. That's not the way I remember things. I think there is a long history here that goes way back. This is a dispute that has been going on for a long time.

:07:37

:07:54

1 I some other e-mails. I have one that I'd like to show. This
2 is an e-mail from October.

3 THE COURT: Okay.

:08:11

4 And this is prior to the November e-mail that they
5 submitted in this case, but the point is that we've been asking
6 for these documents for quite some time.

:08:24

7 And the agreement that they identified -- the alleged
8 agreement that they identified in their November 11th letter was
9 to provide pleadings, deposition transcripts, and discovery
10 responses, and that we would go away. That was what they were
11 saying they were going to do.

12 That's a thing that they had been proposing for a long
13 time, okay?

:08:36

14 And here's what we stated, and this was proposed much
15 earlier, beginning way back when. Our position always was
16 that's not the end point, that's the starting point.

17 And here's an example of this.

18 This an e-mail from us.

:08:51

19 "Third, we have not seen Bio-Rad documents in 10X's
20 production. Your September 20th, 2016, letter agreed to produce
21 documents responsive to Request No. 41 that are also responsive
22 to one or more of plaintiff's other requests.

23 "In your September 28th, 2016 letter" --

:09:05

24 THE COURT: I'm sorry. Do you have an extra one of
25 these e-mails?

1 MR. WALTER: I do. I have an extra one that I gave to
2 opposing counsel.

3 THE COURT: Okay. I was just --

:09:15

4 MR. WALTER: I mean, I can hand this to your clerk, as
5 soon as I complete reading of this.

6 MR. STRUB: You can share this with me.

:09:28

7 MR. WALTER: "You further agreed to produce all
8 depositing transcripts and discovery responses from the Bio-Rad
9 litigation relating to the design and development of the GemCode
10 Platform. Well reiterate that the Bio-Rad pleadings and
11 proceedings are under seal, essentially rendering the Bio-Rad
12 litigation a black box.

:09:40

13 "While plaintiff's do not agree to this unilateral
14 reduction of scope of Request No. 41, plaintiff's will reserve
15 their rights and review 10X's production before insisting on
16 further production."

:09:52

17 That was always our position, okay? I think they were
18 always aware of that. And they don't have any correspondence
19 from us, and if they do, and if they have it, I'd like to see
20 it.

:10:08

21 But they haven't provided to us where they say, yes, we
22 agree. You give us whatever deposition transcripts you think
23 are relevant in your own judgment and then we'll go away and
24 agree never to -- never to pursue any further documents from
25 that litigation.

1 They always knew what our position was on this and this
2 is what we told them on the phone, but this was the starting
3 point, not the ending point.

4 THE COURT: So, Mr. Strub?

:10:19

5 MR. STRUB: Yes.

6 THE COURT: What do you have to say in response?

:10:33

7 MR. STRUB: So, as counsel points out, this October
8 e-mail, which I haven't seen before, is about a month before the
9 important e-mails, which are the ones that your Honor alluded
10 to, which are attached as Exhibit 2 to our letter.

11 And there's no dispute here. In fact, RainDance's
12 letters point out that the agreement was reached -- that was
13 reached was following, in their words, a lengthy meet-and-confer
14 process. This was a process that happened over months.

:10:57

15 And in the -- on Page 3 of Exhibit 2, Lauren Drake from
16 our office writes directly to Mr. Walter, who's sitting across
17 the table from me, "Regarding 10X's" -- this is the second --
18 the third to last paragraph.

19 THE COURT: No, no, I'm just checking.

:11:15

20 I recognize Ms. Drake's name. I've seen her at the
21 Markman, or somewhere along the line, but I hadn't realized that
22 she was writing to Mr. Walter. I thought she was writing to
23 somebody else.

:11:30

24 MR. STRUB: No. This was a meet-and-confer between Ms.
25 Drake and Mr. Walter.

1 And she clearly says what the agreement is.

2 "Regarding 10X's production of Bio-Rad litigation
3 documents, again, to fully resolve this dispute, 10X will agree
4 to produce deposition transcripts, discovery responses, and
:11:48 5 pleadings from the Bio-Rad litigation that relate to the design
6 and development of the GemCode Platform.

7 Then Mr. Walter comes back in the preceding e-mail --
8 this is November 9th.

9 THE COURT: The following e-mail, not preceding.

:12:10 10 MR. STRUB: Yes. The subsequent e-mail preceding the
11 chain.

12 THE COURT: Right.

13 MR. STRUB: I have that problem in depositions all the
14 time, too.

:12:17 15 In the very last paragraph the only comment that Mr.
16 Walter makes is, "As to the Bio-Rad documents, please confirm
17 that the documents that are not subject to any confidentiality
18 concerns will start being produced no later than November 14th."

19 So then if we go to Ms. Drake's subsequent e-mail,
:12:39 20 which is the very first page of the exhibit -- kind of
21 penultimate paragraph there -- she reiterates the agreement.

22 She says, "Regarding the Bio-Rad litigation documents,
23 we plan to begin producing deposition transcripts, discovery
24 responses, and pleadings for the Bio-Rad litigation that relate
:13:00 25 to the design and development of the GemCode Platform, and that

1 are not subject to any confidentiality concerns next week.

2 THE COURT: Yeah. That's not -- I mean, that's not as
3 -- she doesn't really state the agreement so much as she stated
4 in the first one.

:13:20 5 MR. STRUB: That's true, your Honor.

6 The first one is -- is the memorialization that this
7 is, quote, "to fully resolved this dispute."

8 And this is why this is so important.

9 The negotiations that we had with RainDance about these
:13:39 10 30,000 plus documents took place last year. And the reason they
11 took place last year is because it was before the parties had
12 gotten into discovery.

13 And the issues that are being raised right now are the
14 same ones that we were -- that -- there's nothing new. There's
:13:55 15 no new issues. And we wanted to know before getting into
16 discovery what is the world of documents that we're going to be
17 dealing with.

18 And now we're 17 depositions into the case. There's
19 been substantial discovery. And there was a decision made --
:14:10 20 Bio-Rad acquires RainDance -- and a decision was made for some
21 reason.

22 You know what?

23 That agreement that we reached back in November, we
24 don't really like that agreement any more, and we want to get
:14:21 25 out of it.

1 But from our position, if they had said that to us back
2 in November, we would have been in front of your Honor six
3 months ago, because this -- the documents that were produced in
4 the Bio-Rad litigation are, if they were relevant, they would
5 have been produced in this litigation, pursuant to the parties'
6 agreements following the standard procedure to search for
7 documents with search terms.

8 That is why we fought about it so long ago. We didn't
9 just want to say, here's 30,000 documents you have to review
10 that are outside the scope of what we agreed on behalf of 10X
11 they were going to be produced.

12 So our position here is, look, we had this discussion.
13 We had a meet and confer. We had a resolution. We're just
14 asking the Court hold RainDance to its agreement.

15 MR. WALTER: All right.

16 So I think I laid out our position. Our position on
17 this has always been that the depositions, and transcripts, and
18 pleadings were going to be a starting point.

19 Because what they were telling us in the
20 meet-and-confer is that so much of that case is about irrelevant
21 issues.

22 And we said, well, we're skeptical about that, because
23 this is a trade secrets case, it's about the technology that's
24 involved, but let us see the depositions, transcripts, and
25 pleading, and we're going to reserve our rights to seek more

1 based on what we learn.

2 Now, let's find out about what we learned.

3 I think this Declaration they submitted from Michael
4 Weil today, who was the attorney who represented --

:15:56 5 THE COURT: When you say "today," you mean yesterday?

6 MR. WALTER: Yesterday. Who represented 10X Genomics
7 in that dispute.

8 Here's what the documents are allegedly about.

9 He says in Paragraph 7 of his Declaration.

:16:11 10 "Bio-Rad proceedings involve the exchange of hundreds
11 of thousands of documents. Those documents relate to the issues
12 in dispute in those proceedings, including the founder's
13 contractual obligations, surfactant formulation and synthesis,
14 the geometry of 10X's microfluidic chips, vendors,
:16:33 15 manufacturing, quality control methods, next generation
16 sequencing applications, and software routines."

17 So all of those issues are technical issues related to
18 the design and operation of their product, outside of this first
19 issue, which is the founder's contractual obligations.

:16:49 20 Now, I want to be clear about what we're seeking in
21 this case, because there's a little bit of a discrepancy.
22 They're talking about how there's hundreds of thousands of
23 documents that have been produced in that litigation, but
24 there's only 30,000 at issue here.

:17:02 25 THE COURT: Right.

1 MR. WALTER: I want to explain that discrepancy so you
2 know what it is we're seeking and what we're not seeking.

3 The reason they're talking about hundreds of thousands
4 of documents is because in that trade secret dispute, the
:17:14 5 founders of Bio-Rad produced roughly a hundred thousand
6 documents.

7 THE COURT: The founders of?

8 MR. WALTER: Excuse me. The founders of 10X.

9 They produced roughly a hundred thousand documents in
:17:23 10 their personal capability, okay?

11 And we know by conferring with counsel for Bio-Rad in
12 the trade secret dispute that the bulk of those documents relate
13 to their activity before they were at 10X.

14 And we're not seeking those 80,000 documents, because
:17:40 15 those are the documents that relate to the founders contractual
16 obligation.

17 The 30,000 documents that we're seeking are the
18 documents that 10X produced in the arbitration and the trade
19 secret proceeding that are 10X documents that came after 10X was
:17:55 20 formed.

21 And how do we know what those documents relate to?

22 Well, number one, we know because we've been able to
23 speak with Bio-Rad's counsel. They haven't shown us the
24 documents, but they've told us at a high level what those
:18:09 25 documents are about. And they told us they related to the

1 design and operation of 10X's products. It's precisely the
2 stuff that's out --

:18:21

3 THE COURT: Well, haven't you already gotten the
4 documents through other discovery that are about the design and
5 operation of 10X products?

6 MR. WALTER: Well, I think that's an interesting point,
7 isn't this cumulative?

8 Up until now, they've never taken the position that
9 it's cumulative and it's the same stuff we've received, okay?

:18:33

10 Now, I think -- I mean, it is a little bit unclear what
11 position they're taking.

12 THE COURT: Well, I mean, I think -- my impression is,
13 the position they're taking is, we haven't reviewed the 30,000
14 documents, so we don't know exactly what's in there, am I right?

:18:47

15 MR. STRUB: That's right, your Honor.

16 MR. WALTER: I think they do know exactly what's in
17 there. Those documents --

18 THE COURT: Wait, wait.

19 So, Mr. Strub says they have not reviewed them.

:18:56

20 Are you challenging his honesty here?

21 MR. WALTER: Well, what I'm saying is that those
22 documents, they have been reviewed and produced to Bio-Rad, so
23 someone on their side knows exactly what's in them.

:19:08

24 THE COURT: Well, when you say "on their side," what he
25 said was, some other law firm represented --

1 MR. WALTER: That's right. It might have been some
2 other law firm, but 10X's attorneys, whether it's at Irell or
3 the attorneys that represented 10X in the trade secrets dispute,
4 they know exactly what's in those documents.

:19:21

5 THE COURT: But the problem is that saying this group
6 of people know what's in it, when it's that group of people that
7 is representing them now.

:19:43

8 I mean, you know, any documents, somebody in the world
9 knows what's in it, but that doesn't mean that it's -- that the
10 knowledge is just transferred with no effort.

11 MR. WALTER: But there might be some effort involved,
12 there might need to be a phone conversation, and there might
13 need to be a little bit of work. The point is they have access.

:20:00

14 THE COURT: But I think their point is, we had an
15 agreement as to how we were going to do all of this, you know,
16 designate a custodian, blah, blah, blah, whatever.

:20:25

17 And, so, why should we be, you know, looking at this
18 pot of 30,000 documents that's fallen out of the sky, to see how
19 many duplication there is with what we've already given you, and
20 how much of the 30,000, notwithstanding that it post-dates the
21 formation of the company are, nevertheless, irrelevant?

:20:54

22 MR. WALTER: Well, my position on that --

23 THE COURT: And, I mean, so I guess -- so you all set
24 up discovery, so that you were supposed to get whatever it is
25 you needed to make your case, right?

1 MR. WALTER: And part of that process was, we served
2 Requests for Production. One of those Requests for Production
3 we served was for documents related to this case.

4 And one thing I don't know, have they taken those
5 30,000 documents, and have they even applied the search terms
6 that we've submitted?

7 THE COURT: But aren't the search terms supposed to be
8 supplied to -- applied to seven custodians who were presumably
9 not the lawyers for this other firm?

10 MR. WALTER: It's not just -- I don't think it's just
11 limited to custodians. I think they also have to search
12 repositories or other documents they might have. I don't think
13 it's just limited to people.

14 MR. STRUB: Now, your Honor, we complied with the
15 default standard that we agreed to. We applied it to the search
16 terms that were agreed to. We applied it to custodians that
17 were agreed to.

18 And, I mean, your Honor is absolutely right. We have
19 no idea what's in those documents, but to the extent that they
20 are within the category of what the parties agreed to in the
21 default standard, they have them. There's no documents that
22 are, you know, wild documents out there that would have been
23 responsive, that wouldn't have been captured.

24 THE COURT: And I'm sorry, you're saying "wild"?

25 MR. STRUB: Well, no, no, I mean -- that was an

1 inappropriate or inaccurate term.

2 What I'm saying is that --

3 THE COURT: You're talking about the law firm?

4 MR. STRUB: Well, the documents that we searched for
:22:15 5 were 10X documents. And to the extent they were responsive to
6 the protocol that the parties agreed to, they would have been
7 produced.

8 That's what I'm saying, right?

9 THE COURT: Right.

:22:25 10 MR. WALTER: Your Honor, I'm having a hard time with
11 that. We don't even have all the deposition transcripts from
12 that case.

13 I took the 30(b)(6) of their finance person just a few
14 weeks ago. And when I walked in I was surprised to learn that
:22:36 15 she's been deposed once in the arbitration and once in the trade
16 secrets case. And we didn't have the trade secret. We didn't
17 have the deposition transcript.

18 Why?

19 Because they decided to withhold it, okay?

:22:48 20 And, so, I'm a little bit skeptical that we --

21 THE COURT: Well, so, that's a slightly different
22 thing.

23 How much of the transcripts, whatever, that are the
24 things that you agreed to -- and I forget exactly what the
:23:06 25 terminology was to produce whatever you thought was relevant --

1 are you done doing that?

2 MR. STRUB: Yes, your Honor. The agreement was, as in
3 Ms. Drake's letter, we were going to produce anything --
4 transcripts that relate to the design and development of the
5 GemCode Platform.

6 Ms. Osborne was the financial person.

7 THE COURT: Right, I get it.

8 MS. STRUB: She wouldn't have testified about the
9 design and development of the GemCode Platform -- and she didn't
10 -- and that's why the transcript wasn't produced.

11 MR. WALTER: She might not have testified about the
12 design of it, but the fact that -- the notion finance person
13 wouldn't have been testifying about the development and the cost
14 of goods they were putting into things, and the forecast
15 revenues, and the market for this, she would have testified
16 about that. She was deposed for two days.

17 The point is, at a minimum, they're taking a very
18 narrow interpretation of what their obligation was under what
19 they agreed to.

20 THE COURT: Right. But that's a different dispute than
21 the one you're here about today, right?

22 MR. WALTER: I think it is a little bit of a different
23 dispute. If you take their version of the events that there's
24 an agreement here -- and I'm not sure they supplied it -- they
25 fulfilled the agreement, okay?

1 But the point is that there is information related to
2 that trade secret dispute that's not duplicative of what we've
3 already received in this case. We know that.

4 THE COURT: And you say that because?

:24:30

5 MR. WALTER: Because there's at least one deposition
6 transcript within the narrow patch of materials that they
7 haven't produced. There is going to be more information as
8 well.

:24:41

9 Now, I can't emphasize the -- I wanted to do something
10 to try the emphasize and make clear the relevance of the
11 material from this case.

12 I brought two other deposition transcripts along, okay?

13 And I can make them available to the Court. I don't
14 know if you want to read these deposition transcripts.

:24:54

15 The exercise I went through was to try to highlight the
16 material that was going to be relevant to the case, okay?

17 And here's the deposition transcripts from their
18 surfactant person, okay?

:25:10

19 And there's 60 pages of transcript that I highlighted.
20 I saw it. It's all relevant. It's all about the operation and
21 design of their product.

:25:19

22 There's a chunk here that deals with his time at
23 Bio-Rad -- and I admit that's not relevant -- but then the chunk
24 at the beginning is all about the design and operation of the
25 product.

1 THE COURT: Wait, wait.

2 Let me just make sure what you're saying, Mr. Walter.

3 One of the depositions that you got pursuant to Ms.

4 Drake's e-mail, you've gone through and it has at least 60

:25:32

5 relevant transcript pages?

6 MR. WALTER: More, more.

7 And then here's another one. This is another

8 deposition transcript. And I tried to go through the exercise

9 and find --

:25:40

10 THE COURT: And, so, what I'm having trouble with is,

11 they said they would produce relevant documents. Earlier you

12 were complaining that they had a chintzy view of what's a

13 relevant document.

14 MR. WALTER: Mm-hmm.

:25:51

15 THE COURT: Now you're saying, well, here's a document

16 that they produced and it has lots of relevant information.

17 How does that -- what's the impact on the -- how does

18 that help you?

19 MR. WALTER: The way it helps us is, it shows that what

:26:04

20 was going on in that case was information that got down to the

21 gory details of how that product works, and how it's designed,

22 and how it was developed, and what they were going to do in the

23 process of trying to develop that product.

24 It's very detailed, highly relevant information.

:26:19

25 As I was saying for this one transcripts, I tried to

1 highlight it to identify the stuff that was relevant. The whole
2 thing is highly relevant material regarding the design and
3 operation of the product.

4 And we don't have all the documents they even agreed to
5 produce.

6 THE COURT: Remind me, how many pages of documents has
7 10X produced pursuant to the -- not counting these transcripts
8 and things, you know, just pursuant to your normal -- I remember
9 seeing numbers, and I forget whose numbers were big and whose
10 numbers were small.

11 MR. WALTER: They contend that they produced 30,000
12 documents, roughly.

13 THE COURT: And the document is not a page. The
14 document is however many pages the document -- or it's 30,000
15 discrete things, some of which might be multiple pages.

16 MR. WALTER: Right, and I don't have a page count for
17 you.

18 THE COURT: No, I don't care about a page count.
19 And how many pages -- how many documents have you
20 produced to them?

21 MR. WALTER: That I don't know. That I don't know.

22 THE COURT: All right.

23 What else would you like to tell me?

24 MR. WALTER: So, you know, there were -- there are some
25 things I would like to add.

1 First, this notion about the ESI Order, and the ESI
2 Order saying that it's seven custodians, and a certain number of
3 key words.

:27:45

4 The purpose of that ESI Order was not so that there
5 would be a fixed number of custodians on one side, and a fixed
6 number of custodians on the other side, so there would be a
7 level playing field.

8 That hasn't happened here.

:27:55

9 They are one party, so there have been seven custodians
10 from them. We have the University of Chicago and RainDance. We
11 actually had to collect documents from 14 custodians, and
12 through seven through third-party subpoenas, so there is a lot
13 of documents they're filtering through. And we probably
14 filtered through a lot more documents than they, if you take
15 into account the 14 custodians that we've had to look at.

:28:13

16 The key point, though, is that ESI Order that we agreed
17 to, the purpose of that order was not so that we would have a
18 level playing field, or that each decide would have the same
19 number of documents.

:28:25

20 The purpose of the order was to control the burden on
21 discovery on both sides.

22 THE COURT: Yes, that seems like a reasonable thing to
23 say.

:28:33

24 MR. WALTER: That's the purpose of that. That's why we
25 were talking about key words and the number of custodians.

1 It didn't put hard limits on things and it certainly
2 didn't say that you can't go beyond the key words and the
3 custodians, if what you have is a repository of documents that's
4 been reviewed for privilege, that's been reviewed for privilege,
:28:51 5 and it's sitting there and there's no further burden to produce
6 it.

7 There's nothing about that ESI Order that contemplates
8 that --

9 THE COURT: So when you say there is no further burden
:28:57 10 to produce it, Mr. Strub, or whoever wrote the letter said,
11 which seems fairly reasonable to me is, of course there is a
12 burden to produce it, because the lawyers have to go through it,
13 and figure out what it is, and see what is actually, you know,
14 responsive?

:29:17 15 MR. WALTER: My point here is -- first of all, why
16 would you be reviewing those?

17 The primary reason you do a review of documents is to
18 avoid a production of privileged documents. Those documents
19 have already been reviewed for privilege, okay?

:29:29 20 That's happened.

21 Attorneys and/or consultants have gone through them in
22 great detail. They removed the privileged documents, okay?

23 And, so, what is left are documents that we understand
24 relate to the design and operation of the product.

:29:42 25 What kind of documents could -- I mean, it's hard for

1 us to understand what kind of irrelevant documents are going to
2 be in there.

3 What's the harm if we do get a few irrelevant
4 documents?

:29:52

5 As I said earlier, we're trying to sift out the
6 irrelevant documents from what we understand to be relevant. We
7 understand there's 80,000 documents that the inventors collected
8 and produced in their personal capacity that relates to their
9 time when they were at Bio-Rad, not their time at 10X. These
10 are 10X documents.

:30:09

11 And everything we know, everything we know from counsel
12 at Sidley Austin, who's looked at the documents, everything we
13 know from looking at the deposition transcripts that we have
14 seen, is that those documents are going to be detailed
15 documents, highly relevant documents about the design and
16 development of their product.

:30:21

17 THE COURT: And, so, let me just make sure that I have
18 this straight.

:30:36

19 So there's these 30,000 documents that are in the law
20 firm that you think are relevant. Meanwhile, through your
21 discovery procedure, they have produced 30,000 documents, right?

22 MR. WALTER: That's right.

23 MR. STRUB: And your Honor, the actual numbers -- you
24 asked the question before -- is in Footnote 3.

:30:49

25 THE COURT: What are the actual documents?

1 MR. STRUB: So 10X has produced 33,000 documents in the
2 litigation. Each of the plaintiffs, the University of Chicago
3 and RainDance, has produced 3,000 documents.

4 THE COURT: Yeah, even though in these cases, isn't it
5 usually the defendants that produce more documents?

6 MR. STRUB: Well, right. And the third parties have,
7 including -- including the inventors, have produced about 13,000
8 documents.

9 So 10X has produced 33,000 and collectively 10X has
10 received from multiple sources about --

11 THE COURT: No. The point that I was just asking is,
12 you get a treasure trove of documents that we said is 30,000.
13 They've already produced 33,000.

14 Presumably, the two things are not at all inconsistent,
15 that they have produced a bigger pile than what you're now
16 saying they produced in some other case where the same issues
17 were at stake, right? Isn't it your theory that somehow or
18 other the trade secrets case involved the same issues as this
19 case, so they produced 30,000 documents?

20 Now, later in time, they're litigating with you on
21 these same issues, and they produced 33,000 documents.

22 Doesn't it seem actually likely there's going to be a
23 fairly heavy overlap between what they produced before and what
24 they produced now?

25 MR. WALTER: Well, if that's the case, there's a heavy

1 overlap between what they produced now, and what they produced
2 earlier, and there is no burden to providing them, why wouldn't
3 they make them available to us?

4 That's what I don't know understand.

:32:30

5 THE COURT: All right.

6 MR. WALTER: I mean, the cumulativeness argument
7 doesn't seem to advance the ball here.

8 If it really is the same stuff --

9 THE COURT: All right.

:32:37

10 Hold on a for minute.

11 Mr. Strub, I let Mr. Walter talk for a while. What do
12 you have to say?

13 MR. STRUB: Your Honor, I think you identified the
14 points. I don't have much to add, unless your Honor has
15 concerns about this.

:32:48

16 I wouldn't be here -- my clients wouldn't pay for me to
17 come out here if we weren't concerned about the substantial cost
18 and burden of having to go through these 30,000 documents.

19 And contrary to what Mr. Walter had said, we're not
20 reviewing the -- we don't review documents just for privilege.
21 We review documents so that we know what evidence is at issue in
22 the case, what evidence we're going to expect to be shown to our
23 witnesses, what evidence might be used with other witnesses -- I
24 mean, this -- the facts in the case.

:33:06

:33:22

25 THE COURT: So tell me -- you're obviously an

1 experienced lawyer at this -- based on what you know about the
2 30,000 documents that are in the law firm's files, or, you know,
3 however they're stored, given that they've been produced before,
4 how many lawyer hours, or paralegals hours, or whoever you put
5 on this job, would it to take review them before you would
6 produce them?

7 MR. STRUB: Well, we wouldn't -- it wouldn't be a
8 matter of reviewing them before production I don't think.
9 That's not the issue.

10 The burden is in production. The burden is in taking
11 this vast amount of information, double the size that's already
12 been produced, and figuring out whether there are any new
13 documents in here that didn't hit on the parties agreed-upon
14 protocol, that might be used in the case, that we have to
15 integrate into our outlines of evidence, we have to integrate
16 into our examination outlines, and every single document would
17 have to be reviewed in order to do that. We've never see them.
18 We don't know what's in them.

19 And, in terms of how many lawyers hours, it's -- so I
20 was looking at this, and I'm sort of old school, I think of it
21 in terms of banker's boxes.

22 I looked at this and said, this is a probably about 50
23 banker's boxes worth of documents.

24 And, you know, from the way I used to calculate these
25 things.

1 THE COURT: Yes, I'm familiar with the concept.

2 MR. STRUB: And, so, depending on how -- we don't have
3 a huge team. We have a couple of associates who are working on
4 this primarily.

:35:05

5 And, you know, based on my experience, it's really
6 difficult to get through that amount of material in a short
7 period of time. I mean, I'm thinking this is maybe a month's
8 worth of work reviewing these documents.

:35:26

9 THE COURT: So I'm just curious, but I understand there
10 are software programs or something.

11 Wouldn't you first take the 30,000 documents and run
12 some program that would tell you which ones are duplicates?

:35:44

13 MR. STRUB: The problem with that software is that it
14 only picks up absolutely identical duplicates. And many of the
15 documents -- and this is why there are duplicates in production
16 -- many of the documents, for example --

17 THE COURT: If they have somebody else's initials on
18 them?

:35:56

19 MR. STRUB: Or it's an e-mail chain and you have one
20 e-mail in the production, but it's part of a chain, and the
21 other production has just the one e-mail. That won't hit as a
22 duplicate.

23 And believe me, I've asked the same question that your
24 Honor has.

:36:10

25 Why can't we just run some software program and knock

1 out the duplicates? Why am I seeing, you know, four boxes of
2 documents here all which seem to be duplicative?

3 And that's the answer is, the software is not yet at
4 the point robust enough to where it can -- it can perform that
5 function.

6 Like I said, your Honor, I have other things to do. I
7 wouldn't be here if we weren't concerned about the burden. And
8 that's why we negotiated this way back in November, because we
9 were concerned about exactly this issue.

10 And that's why we reached the agreement, and we would
11 not have reached that agreement if we did not believe, as Ms.
12 Drake said, that fully and finally resolved the dispute.

13 If we knew we were going to have this dispute again, we
14 would have said, okay, let's have this dispute in November
15 before the depositions had begun so we know what's in play.

16 And, you know, what happened is, Bio-Rad acquires
17 RainDance. There's a new boss in town. Counsel for Bio-Rad --

18 THE COURT: Yes, I heard that the first time.

19 MR. STRUB: Yes.

20 THE COURT: And remind me, 10X, is that a privately-
21 held company?

22 MR. STRUB: Yes, your Honor.

23 THE COURT: And, so, there is no public information
24 about the state of its finances?

25 MR. STRUB: No, your Honor. We've disclosed that

1 information under the Protective Order, but --

2 THE COURT: All right.

3 So you don't have any more to say.

4 Do you have any more to say?

:37:52

5 MR. WALTER: Well, I think -- you know, you asked the
6 question, what do we -- what do we know about these documents?

7 And here's the evidence they submitted about what's in
8 those documents.

:38:03

9 Founders contractual obligations, surfactant
10 formulation and synthesis, the geometry of 10X's microfluidic
11 chips, vendors, manufacturing, quality and control methods, next
12 general sequencing applications and software routines.

13 It's almost all technical information about their
14 product.

:38:15

15 Now, the -- the argument they're pushing on most
16 heavily now is burden. And the burden they're identifying is
17 not that it would be hard for them to produce the documents.
18 The primary burden they're identifying is that these documents
19 would now be part of the case.

:38:31

20 THE COURT: And they at least would have to be reviewed
21 to see whether they're part of the case.

22 MR. WALTER: Well, I don't know that they do need to be
23 reviewed to see if they're part of the case.

:38:42

24 Our position is that based on what we know, what
25 Michael Weil has told us about those documents, they should be

1 part of the case.

2 And based on what we see in the deposition transcripts,
3 they should be part of the case. Everything we've seen so far
4 tells us that those documents should be part of the case, maybe
:38:53 5 not the 80,000 documents that predate the founders time at 10X,
6 but the 30,000 documents that come after. Everything we know
7 tells us that they should be part of the case. They haven't
8 really identified anything to suggest otherwise.

9 Like I said, they're shifting now off this argument
:39:08 10 about burden, of not having them to be produced. Really,
11 they're primary argument is that they're going to be part of the
12 case, and we're going to have to look at them and find out
13 what's in them, in case there is something extra.

14 So, you know, they kind of want to have it both ways.

:39:20 15 On the one hand they want to say, it's all duplicative,
16 we shouldn't have to produce it, because they already got it,
17 but on the other hand, they're saying they're going to face an
18 ordinary burden of a month's worth of work to figure out if
19 there's anything new in there.

:39:33 20 There might be something. The truth is probably in
21 between, okay?

22 There is probably going to be some new documents, and
23 whatever those new documents are, I don't see any reason why we
24 shouldn't have them. There's no burden for them to produce it.

:39:45 25 And this notion that they're not going to be able to

1 use any software to figure out what's new and what isn't new,
2 that's probably not true. They're going to be able to narrow it
3 down using the software, and that's going to reduce the burden,
4 which I think is going to be pretty minimal.

:39:58 5 30,000 documents is not a lot of documents. It's not
6 going to take them a month of time to get through. That's for
7 sure.

8 Now, I want to -- I want to note one other thing real
9 quick.

:40:07 10 These documents that they're withholding from us, and
11 not release them for the case, they've subpoenaed us for those
12 documents.

13 THE COURT: Well, I gather they had subpoenaed Bio-Rad.

14 MR. WALTER: They subpoenaed Bio-Rad, that's right.

:40:19 15 THE COURT: Right. Who's not you, right?

16 MR. WALTER: Well, we are representing Bio-Rad in
17 connection with the subpoena. Bio-Rad is not the owner of --

18 THE COURT: No, I understand Bio-Rad's bought or
19 they're in the process of buying RainDance.

:40:31 20 MR. WALTER: The acquisition is complete.

21 THE COURT: Okay.

22 MR. WALTER: Yes.

23 THE COURT: All right.

24 Yeah, yeah, I guess they continued things, so you could
:40:37 25 actually substitute Bio-Rad in?

1 MR. WALTER: Yeah, and that's in process.

2 THE COURT: Okay.

3 MR. WALTER: And, so, they subpoenaed -- days after
4 that acquisition happened -- they subpoenaed Bio-Rad for those
:40:46 5 very documents, okay?

6 You know, it can't be that they can go to Bio-Rad and
7 say, we want every document you have related to 10X, and we want
8 every document your attorneys have related to 10X.

9 And, oh, by the way, don't give us any of the
:40:59 10 documents.

11 THE COURT: I thought they were trying to get from
12 Bio-Rad the documents related to RainDance.

13 MR. WALTER: No, they're request was all documents
14 related to 10X. That's what they wanted to do.

:41:11 15 They went to Bio-Rad and they said, give us all
16 documents related to 10X.

17 And, in that subpoena, they just didn't say, give us
18 all documents that you, Bio-Rad, have related to 10X.

19 They said, give us all documents all your attorneys
:41:21 20 might have related to 10X.

21 They subpoenaed us for those documents.

22 And now they're telling us, no, all those documents
23 from the 10X/Bio-Rad litigation, that 10X has in those cases
24 that are now in the possession of your attorneys, those are off
:41:38 25 limits. Those are off limits, because there's a Protective

1 Order.

2 THE COURT: Okay.

3 MR. STRUB: Your Honor, that's a complete red herring.

4 Obviously, 10X was not subpoenaing BioRad for 10X
:41:50 5 documents, and we offered to withdraw the subpoena, and clarify,
6 and make that clear.

7 The reason we were seeking documents from Bio-Rad
8 relating to 10X products related to the valuation that Bio-Rad
9 put on RainDance's part of the accusation. That was what --

:42:07 10 THE COURT: Well, that's -- you must have put that in a
11 footnote or something, because that's what I thought you were
12 doing, because that -- that's logical why you would subpoena
13 from Bio-Rad, the documents that presumably were exchanged in
14 litigation, when presumably the law firm that has the 30,000
:42:31 15 also has whatever Bio-Rad produced.

16 Yeah, that's a lot harder to figure out.

17 MR. STRUB: Right, this is kind of a gotcha argument.
18 Your subpoena is overbroad, therefore, we got you.

19 And told them that we will withdraw the subpoena and
:42:41 20 reissue it.

21 That's really the genuine issue here.

22 THE COURT: Well, so are you actually withdrawing the
23 subpoena?

24 MR. STRUB: Well, no.

:42:48 25 What the position that -- that RainDance has taken

1 here, oh, no, no, no, we don't -- we don't want you to do that.

2 We want you to stick with the subpoena you originally
3 served, because we like -- because we like the language that you
4 used in that subpoena, because we think it includes these 10X
5 documents.

6 THE COURT: Is there anything else either of you want
7 to say?

8 MR. STRUB: No, your Honor, not from me.

9 MR. WALTER: I don't think I have anything further to
10 add.

11 THE COURT: Why don't you all just hold on here for a
12 minute. I'll be back in a few minutes.

13 (A recess was taken at this time.)

14 (The proceedings reconvened as follows:)

15 THE COURT: So I've considered what the parties wrote
16 in their letters and what they said today, and I think that --
17 what I'm convinced of is that the parties agreed upon a way to
18 conduct discovery in this case, which the parties thought would
19 be sufficient to provide both sides with what they needed to
20 litigate this case pursuant to these procedures.

21 Plaintiff has gotten 33,000 documents, which are
22 presumably relevant.

23 Now, they want more. They want to search through a
24 database of 30,000 documents. I think they just want the whole
25 database, which logic would suggest, since we don't have any

1 actual facts, that this database, to a large extent, duplicate
2 items that are elsewhere in the RainDance's database -- I'm
3 sorry -- not the RainDance, the 10X database. And, thus,
4 presumably for the most part have already been produced.

:02:40 5 Therefore, it seems to me that plaintiff's request is
6 inconsistent with the now familiar proposition that discovery
7 should be proportional to the needs of the case.

8 And, therefore, I'm going to deny plaintiff's request.

9 All right.

:03:01 10 MR. STRUB: Thank you, your Honor.

11 THE COURT: We're in recess.

12 (The proceedings adjourned at 4:03 o'clock p.m.)

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